THE MERGER CASE.[1]

THREE Jerseymen, whom we will call Morgan, Hill and Lamont, own each a cart and one horse. Their occupation is the carrying of eggs and chickens from the neighboring farmers to a market town over the New York border. They agree to form a corporation under the name of the Interstate Poultry Traffic Association. The only capital they turn in consists of their horses and carts, except a few dollars contributed to pay for their charter. Are they criminals liable to be fined $5,000 apiece and imprisoned for a year?

This simple but typical case seems to serve better to test the doctrines laid down in the Merger decision than the sensational facts which were there actually before the court.

There are two questions:

I. Could Congress declare such men to be criminals?

II. Has Congress declared them to be criminals?

I. Congress has full power over interstate commerce. The power to regulate commerce includes the power to destroy it by an embargo or by a prohibitive protective tariff, and such regulation can be enforced by criminal statutes.

Can Congress say to a person actually engaged in interstate commerce: "You shall not dispose of a share in your business in such a way as will put you under a temptation to carry on interstate commerce in a manner we deem injurious to the public"? Would an Act of Congress to that effect be constitutional?

Harlan, Brown, McKenna, and Day, JJ., hold that it would be constitutional, and so, perhaps, does Brewer, J.

Mr. Justice White (with whom it would seem that Fuller, C. J., and Holmes and Peckham, JJ., agree) thinks that it would not.

On this point, the first opinion seems correct, although the dangers of the abuse of the power are so great and so obvious that one reaches the conclusion with reluctance.

Congress cannot interfere with manufactures or agriculture on the ground that their products will be the subjects of interstate

[1] This notice of Northern Securities Company *v.* The United States, decided in the Supreme Court of the United States, March 14, 1904, has been prepared at the request of the Editors of the HARVARD LAW REVIEW.

commerce, but here it is proposing to interfere with (or, to use the words of the Constitution, to "regulate") interstate commerce itself; it is endeavoring to prevent a state of things which it believes will have a direct effect, not on the price of the transported article, but on the cost of the transportation itself.

II. Has Congress declared them to be criminals?

If it has done so, it is by virtue of 26 U. S. St. 209 (1890), an Act entitled "An Act to protect trade and commerce against unlawful restraint and monopolies."

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and" subjected to the same penalty as under the first section.

SEC. 3. Contains similar provisions as to commerce between the States and the District of Columbia or the Territories.

SEC. 4 and SEC. 5. Give the Circuit Courts authority to issue injunctions to restrain violations of the Act.

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this Act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States," etc.

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Judge Holmes justly calls attention to the fact that this Statute is a penal, a severely criminal statute, and also that it cannot receive a different interpretation on a bill for an injunction than it is to receive on an indictment.

It is a wholesome rule of the common law that penal statutes must be construed strictly, — a rule which has of late years been too much neglected by our courts. They are greatly given to construing a statute taking away a man's property or liberty of action as if it were a contract into which he had entered.

What does the Statute make criminal? *First:* It makes criminal " Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *Secondly:* It declares that " Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations " shall be deemed guilty of a crime.

The prevention of competition is not criminal unless it is a restraint of trade or a monopolizing.

A contract in restraint of trade is something well known to the common law. It is a contract by which a person carrying on a business agrees with another to abandon or restrict that business.

Monopolizing a business is excluding outsiders from carrying on the business.

In our typical case, and in the case of the Northern Securities Company, there was no contract by which a person or corporation abandoned or restricted his own business. If a junction of interest is a restraint of trade, then two expressmen who have been carrying on business between the city of New York and Jersey City became criminals by forming a partnership. Such an intention is not to be lightly attributed to a respectable legislative body like Congress.

Neither was there any monopolizing of the business. If our egg-collectors had combined to drive or keep another person off their route, they would have violated the Act. If the Great Northern Railway Company and the Northern Pacific Railway Company had combined to keep another railroad out of the territory which they served, that would have been a monopoly.

Therefore, if it is an open question, the opinion of Judge Holmes, and of the judges who agreed with him, that there had been no violation of the Statute, seems the better. But is it an open question, or is it concluded by the cases of United States *v.* Freight Association,[1] and United States *v.* Joint Traffic Association?[2]

[1] 166 U. S. 290.

[2] 171 U. S. 505.

There agreements between certain railroad corporations establishing rates between themselves were held to violate the Statute. There was no "monopolizing," for there was no attempt to exclude other railroads from business. The contract must have been held void because in restraint of trade.

Judge Holmes says he has no desire to criticise or abridge these decisions. He seems to consider the agreements between the railroads as amounting to several contracts by each railroad with strangers in restraint of its own business, and therefore as coming within the ordinary definition of contracts in restraint of trade. But is this so?

The direct object of the ordinary common law contract in restraint of trade is the infliction of a detriment in carrying on his trade upon the tradesman, for the benefit of a stranger; that it may have the effect of limiting competition is only an indirect consequence. But the Traffic agreements had not for their direct object the infliction of a detriment upon any railroad in carrying on its business, but, on the contrary, to confer benefits upon them all in carrying on their business. The common law contract in restraint of trade restrains a man from carrying on business of a certain kind or in a certain place. But the Traffic agreements did not restrain a railroad from doing any business in any place, or from making as high charges as it wished. The object of the agreement was to secure a railroad from being forced to charge less than it wished. The limiting of competition was the primary object of the contract. Such an agreement may be a contract to forestall or engross or do something else naughty, but it does not appear to come within what had previously been deemed the definition of a contract in restraint of trade. The Traffic Association Cases do, therefore, appear to have held that the Statute covered not merely common law contracts in restraint of trade, and monopolies, but also extended to contracts which were neither, but were contracts to limit competition. On this point, we find it difficult to follow Judge Holmes. This does not mean that Judge Holmes is wrong in his conclusion, and the Traffic Association decisions right, but simply that his conclusion seems not consistent with those decisions.

A distinction between the Traffic Cases and the Merger Case has been much insisted upon. In the Traffic Cases, it is said, the agreement directly limited competition, while in the Merger Case the agreement merely gave the opportunity to limit competition;

but it seems as if taking the step of extending the Statute to cover every contract limiting competition was the passing of the Rubicon, and that the Court might then well take the further step.

Perhaps the position of Judge Brewer is the most significant feature of the Merger Case. He was with the majority of the Court in the Traffic Association Cases, and to the correctness of the result in those cases he adheres. He would, therefore, it is presumed, still hold that a contract limiting competition in interstate commerce, although neither a common law contract in restraint of trade nor a monopoly, might be within the Statute; but now, apparently shocked by the possible result of a doctrine which might send to prison two expressmen who had formed a partnership to carry between two towns in adjoining states, or the brakemen on an interstate railroad who had struck for an eight hour day, he energetically declares that, in contradiction to what was said in the Traffic Association Cases, an agreement, in order to violate the Statute, must be in *unreasonable* restraint of trade.

Now that Judge Brewer has, in so marked a manner, repudiated the doctrine which was the ground of the opinions in the Traffic Cases, where he was with the majority, and that Judge Peckham, who delivered these opinions, is one of the minority in the Merger Case, the Traffic Association Cases must be considered, to speak familiarly, as having received a black eye, or rather two black eyes.

The Statute is still capable of being abused, but from the worst abuses the Supreme Court, as at present constituted, will protect the community, and we can join in Judge Holmes's expression of satisfaction that only a minority of the Court adopt an interpretation of the statute which "would make eternal the *bellum omnium inter omnes* and disintegrate society as far as it could into individual atoms."

J. C. G.